Filed 10/1/02 Allan v. First Healthcare Group CA4/1

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

ROBERT M. ALLAN et al., as Trustees, etc. Plaintiffs and Appellants, v. FIRST HEALTHCARE GROUP et al., Defendants and Appellants.	D037529 (Super. Ct. No. 726980)

APPEALS from a judgment of the Superior Court of San Diego County, E. Mac Amos, Jr., Judge. Affirmed.

A family trust administered by plaintiffs Robert and Mary Allan (the Allan Trust or the trust) invested $200,000 as a limited partner in Mission Bay Plaza Associates (Associates), a partnership formed to develop a medical office building adjacent to the Mission Bay Hospital (the Hospital) in San Diego. After the Hospital refused to comply with its financial commitment for the project, the partnership sued and received a $900,000 settlement. The Allan Trust and the partnership's general partner (First

Healthcare Group d.b.a. First Healthcare Partners (First Healthcare)) could not reach agreement on how to distribute the settlement funds and the Allan Trust brought suit against First Healthcare, its general partners and their principals (Gregory Nelson and C. Randall Strada) and others. After a bench trial, the trial court entered a judgment dissolving the partnership and distributing the partnership assets.

The Allans, as trustees of the Allan Trust, appeal the judgment, contending that the trial court erred in (1) refusing to admit extrinsic evidence to interpret the partnership agreement; (2) interpreting the agreement to allow the general partner to receive certain fees even though a contractual condition precedent to the partnership's obligation to pay such fees (i.e., the commencement of construction) never occurred; (3) allowing the partnership to pay attorney fee "savings" achieved in the litigation against the Hospital to Strada; (4) entering judgment in favor of First San Diego, Inc., a former general partner of First Healthcare (First San Diego); and (5) awarding First San Diego attorney fees and costs in the action. Nelson, Strada and First San Diego also appeal, contending that the trial court abused its discretion in denying them portions of their attorney fee requests. We affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

In 1993, Nelson's company, Gremark Partners, Inc. (Gremark), entered into a development agreement with the Hospital to build a medical office building on the Hospital's property in the Mission Bay area. Gremark formed Associates and planned to raise money for the project by selling partnership interests to third party investors. The Hospital committed to contribute $1,000,000 to the project in exchange for a 40 percent

limited partnership interest in Associates. Nelson approached Mr. Allan as a prospective investor in the project and, after reviewing the project documentation and negotiating some changes to the draft partnership agreement, Allan agreed to invest $200,000, through the Allan Trust, as the initial limited partner of Associates. On his own initiative, Nelson provided the Allan Trust with security for the investment, consisting of a conditional $200,000 promissory note payable from any distributions he received from another partnership in which he was the principal and a security interest in his right to receive such distributions. Thereafter Nelson sought, unsuccessfully, to solicit other limited partner investors for the project.

Although the Hospital had paid for certain site work improvements necessary to carry out the project, it did not make its capital contribution as a limited partner and by early 1994, it began to seek a reduction in the level of its participation in the project. Because of the uncertainties about the Hospital's involvement in the project, Nelson could not effectively seek additional limited partner investors, but he and Allan met with Strada about Shrada's possible involvement with the project. Strada agreed to participate as a general partner in Associates and, in May 1994, Gremark assigned its general partnership interest in Associates to First Healthcare, a general partnership in which Gremark and a Strada entity (initially First San Diego and later FSD Corporation (FSD)) were general partners.

Despite the Hospital's continuing reticence, Associates continued its work on the project, entering into a long-term ground lease for the site, reworking the facilities design plans in response to the Hospital's request that the building size be reduced significantly, conducting geotechnical and earthquake studies, pre-leasing the space in the building,

completing architectural plans and obtaining a loan commitment and the permits necessary for the construction. However, in late 1995, after Columbia/HCA Healthcare Corp. (Columbia) bought the Hospital, the Hospital began to delay its performance relating to the project and ultimately refused to perform its remaining obligations. In April 1996, Nelson and Strada concluded that the project could not proceed and on April 22, 1996, Strada wrote Mr. Allan a letter indicating that the partnership would have to sue Columbia and that it was likely the project would never be built.

Shortly thereafter, Associates hired the law firm of Procopio, Cory, Hargreaves & Savitch (Procopio Cory) to bring an action against Columbia on its behalf and entered into a partial contingency arrangement with the firm, whereby it agreed to pay all costs and attorney fees calculated at one-half of the firm's regular billing rates and, in the event of a recovery, a contingency fee of 16.66 percent, which was half of the firm's normal contingency fee. Because Associates had no funds to pay for the litigation, Strada agreed to be responsible for paying the fees and costs (which would be subject to reimbursement only if the lawsuit resulted in a recovery). In exchange for his agreement, Strada was entitled to receive any attorney fee "savings" (i.e., the difference between the amount that would have been paid to the firm under its normal contingent fee of 33.3 percent less the fees payable under the partial contingency arrangement) if Associates recovered against Columbia. Strada and Nelson disclosed the attorney fee "savings" arrangement to the Allan Trust and offered it the opportunity to participate. However, the trust declined to do so because of its on-going dispute with Nelson and Strada regarding how the unsold partnership interests should be allocated among the existing partners. Mr. Allan later wrote a letter objecting to

the arrangement as overly beneficial to Strada, although he admitted at trial that his objection was based on a mistaken belief that the arrangement allowed Strada to receive 33 percent to 40 percent of any recovery from Columbia. The Allan Trust also refused Nelson's request that it release him from the promissory note securing its partnership "investment," because Mr. Allan wanted to keep "both options open."

In July 1996, Procopio Cory filed the action against Columbia. Because Mr. Allan had been unable to reach agreement with Nelson and Strada on the allocation of unsold partnership interests in Associates, the Allan Trust retained separate counsel to monitor the litigation. In October 1997, Columbia agreed to settle the case for $900,000 and a release of its cross-claims against Associates for the approximately $520,000 it had contributed to the project. Although the Allan Trust requested that all of the settlement funds be held in trust pending a resolution of the partners' dispute, Associates used settlement proceeds to pay (1) Procopio Cory $195,256.58 in fees and costs and (2) FSD $100,000 in reimbursement of the approximately $38,000 in fees and costs it previously paid to the law firm and in attorney fee savings.

Shortly thereafter, Associates sent the Allan Trust a check for $292,777.57, in repayment of the $200,000 "loan" plus 10 percent interest. The trust denied that the amount in excess of its original investment was interest and demanded an accounting of partnership expenses. Associates provided various documents to the Allan Trust and hired accountant Leonard Sonnenberg to prepare a report regarding partnership expenses. Sonnenberg prepared detailed reports, which showed that Associates had paid Gremark $114,500 in lease commissions, $186,706 in development fees and $70,550 in design

coordination fees. The Allan Trust challenged the propriety of the distributions and ultimately brought this action against First Healthcare, Nelson, Gremark, Strada, FDS and First San Diego for dissolution and accounting, declaratory relief, breach of contract, conversion, constructive fraud and civil conspiracy.

In a bench trial, the court found that Associates overpaid Gremark $34,000 in lease commissions and $550 in design coordination fees and awarded the Allan Trust $34,550 against Gremark and First Healthcare on its breach of contract claim. The court found that the partnership had dissolved on April 22, 1996 and that the Allan Trust was entitled to receive a distribution of 79 percent of the net partnership assets (as adjusted for the $92,777 in "interest" previously distributed to the Allan Trust, plus interest). On subsequent motions by all parties to recover their attorney fees, the court awarded (1) the Allan Trust $59,459.87 in attorney fees and $3,241.26 in costs against First Healthcare and FSD; (2) Strada $15,000 in attorney fees and $1,219.81 in costs against the Allan Trust; (3) First San Diego $15,000 in attorney fees and $1,219.81 in costs against the Allan Trust; and (4) Nelson $10,000 in attorney fees and $738.20 in costs against the Allan Trust.

DISCUSSION

1. *The Allans Trust's Interest in the Partnership*

First Healthcare, First San Diego, FSD and Strada (collectively, the Strada defendants) argue that the Allan Trust's interest in the partnership was as a lender rather than an investor and thus it did not have any rights as a limited partner under the partnership agreement. Although they acknowledge that the Allan Trust was identified as a limited partner in the partnership agreement and in the note itself, the Strada defendants

nonetheless contend that no such limited partnership interest existed because the money the Allan Trust provided to Associates was not "at risk." They rely on language in a dissenting opinion in *Kazanjian v. Rancho Estates, Ltd.* (1991) 235 Cal.App.3d 1621, 1634 to the effect that, a limited partner's contribution to the partnership is an "at risk" investment and thus may not lawfully be secured or guaranteed.

The issue in *Kazanjian* was whether an innocent general partner is liable to a limited partner for losses suffered because of a misappropriation of partnership funds by another general partner and the dissent challenged the majority's conclusion that, although the innocent general partner is not directly liable to the limited partner, it is required to reimburse the limited partner for its proportionate share of such losses. In that case, there was no dispute about the limited partner's status as a limited partner and thus neither the analysis of the majority nor the dissent is relevant to the issue presented here, which is whether the Allan Trust was in fact a limited partner.

Whether a partnership is created between two or more parties is primarily a question of fact to be determined by the trier of fact from the evidence and inferences drawn therefrom. (*E.g., Filippo Industries, Inc. v. Sun Ins. Co.* (1999) 74 Cal.App.4th 1429, 1444.) A partnership exists when there is "an agreement between the parties under which they have a community of interest, that is, a joint interest, in a common business undertaking, an understanding as to the sharing of profits and losses, and a right of joint control." (*Holtz v. United Plumbing & Heating Co.* (1957) 49 Cal.2d 501, 506-507.) In determining whether the parties' relationship is one of partnership, "the courts are guided

not only by the spoken or written words of the contracting parties, but also by their acts." (*Singleton v. Fuller* (1953) 118 Cal.App.2d 733, 740.)

Here, there is substantial evidence in the record to support the trial court's finding that the Allan Trust was a limited partner in Associates. The evidence is uncontroverted that Nelson approached Mr. Allan to participate in the project as the initial limited partner of Associates and that the parties' negotiations were all based on the Allan Trust's involvement in the partnership as such. The partnership agreement and the note itself refer to the Allan Trust as a limited partner and after a dispute arose as to the proper distribution of partnership assets, Associates acknowledged the trust's rights as a limited partner by providing it with an accounting. Further, the Allan Trust was identified as a partner rather than a lender in Associates' tax returns. The fact that Nelson offered to, and did, provide the trust with security for its investment against his own personal assets, although unusual, does not require a finding that the nature of the trust's relationship with Associates was as a creditor rather than a partner. There is ample evidence in the record to establish that the Allan Trust was a limited partner in Associates.

2. *The General Partner's Entitlement to Compensation*

The court found that Associates properly paid Gremark (1) $31,000 in organization fees, (2) $25,000 in partnership structuring fees, (3) $80,500 in lease commissions, (4) $186,706 in development fees, (5) $70,000 in design coordination fees and (6) $39,654 in miscellaneous expenses (accounting, marketing, overhead, interest, other). The Allan Trust argues, however, that extrinsic evidence, as well as the express terms of paragraphs 10.1.5

and 5.5 of the partnership agreement, establishes that the general partner was not entitled to receive more than $45,000 in fees prior to the commencement of construction.

Absent an express or implied agreement to the contrary, "[a] partner is not entitled to remuneration for services performed for the partnership, except for reasonable compensation for services rendered in winding up the business of the partnership." (Corp. Code, § 16401, subd. (h); former Corp. Code, § 15018; see generally *Busick v. Stoetzl* (1968) 264 Cal.App.2d 736, 738.) In this case, the general partner's entitlement to compensation is governed by the terms of the parties' agreement as reflected in the partnership agreement.

A. Admissibility of Extrinsic Evidence

The goal of contractual interpretation is to determine and give effect to the mutual intention of the parties. (Civ. Code, § 1636; Safeco Ins. Co. v. Robert S. (2001) 26 Cal.4th 758, 763.) That intent is to be inferred, if possible, solely from the written provisions of the contract and thus, if the contractual language is clear and explicit, it will govern. (*Foster-Gardner, Inc. v. National Union Fire Ins. Co.* (1998) 18 Cal.4th 857, 868.) However, even if contractual language appears unambiguous on its face, a trial court must provisionally receive proffered extrinsic evidence to determine if the language has a latent ambiguity and the contract is reasonably susceptible of a particular meaning. (*Pacific Gas & E. Co.* v. *G.W. Thomas Drayage etc. Co.* (1968) 69 Cal.2d 33, 39-40.) Extrinsic evidence is thus admissible to interpret the language of a written instrument, so long as such evidence is not used to give the instrument a meaning to which it is not reasonably susceptible. (Code Civ. Proc., § 1856, subd. (g); *In re Marriage of Iberti* (1997) 55 Cal.App.4th 1434, 1440.)

At trial, the defendants brought a motion in limine to exclude parol evidence relating to the partnership agreement. The court denied the motion, indicating that it would rule on specific objections as to particular evidence sought to be introduced. Thereafter, the Allan Trust introduced evidence of Mr. Allan's pre-contract negotiations with Nelson regarding the partnership agreement provisions relating to pre-construction general partner compensation. Specifically, Mr. Allan testified that he initially objected to any pre-construction compensation to the general partner, but ultimately agreed that Associates could pay the general partner $45,000 in design and construction coordination and partnership structuring fees prior to the commencement of construction. He also testified Nelson provided him assurances that the development fees would not be payable until after construction began. The court subsequently struck Mr. Allan's testimony regarding his conversations with Nelson prior to signing the partnership agreement.

The Allan Trust contends the trial court erroneously excluded the evidence of Mr. Allan's conversations with Nelson regarding general partner compensation. However, the court did not exclude the evidence, but rather admitted the evidence provisionally to determine whether the partnership agreement was reasonably susceptible to an interpretation that the general partner's pre-construction compensation was limited to $45,000. In subsequently striking the evidence, the court found that the agreement was unambiguous and not susceptible to the interpretation urged by the Allan Trust. Based on our independent review of the issue (*City of Chino v. Jackson* (2002) 97 Cal.App.4th 377, 383-384), we agree with the trial court's conclusion. The partnership agreement (specifically, paragraph 5.5) sets forth the components of compensation payable to the general partner and the conditions

under which such compensation is payable, but does not include any language limiting the general partner's pre-construction compensation to $45,000 in specified fees. The Allan Trust proffered the extrinsic evidence to establish that the parties had, in pre-contract negotiations, agreed on such a limit; however, extrinsic evidence of such a collateral agreement or additional contract term is not admissible. (*Bionghi v. Metropolitan Water Dist.* (1999) 70 Cal.App.4th 1358, 1367-1368.) The trial court did not err in striking the extrinsic evidence.

B. The Terms of the Partnership Agreement

i. Paragraph 10.1.5

Paragraph 10.1.5 of the partnership agreement provides for dissolution of the partnership if Associates was unable to acquire the necessary ground lease, permits, construction loan or capital to develop the project. In the event of such a dissolution, section 10.1.5 specifies that "all cash contributions previously made to the Partnership shall be returned, if available, to the Partners entitled thereto, without interest; provided, however, the General Partner shall have no obligation to return to . . . any Limited Partner any deficiency in available capital, *nor shall any Partner be entitled to any fee* and the Partnership shall be under no obligation to proceed with the development of the Project." (Italics added.) The Allan Trust's reliance on paragraph 10.1.5 is confusing at best and disingenuous at worst. Assuming that paragraph 10.1.5 otherwise applies, it would prohibit the payment of *any* fees to the general partner, not cap general partner compensation at $45,000. Paragraph 10.1.5 does not support the Allan Trust's assertion that, because construction was never commenced, the general partner's compensation was limited to $45,000.

ii. Paragraph 5.5

Paragraph 5.5 of the partnership agreement provides:

> "The Partnership will pay the expenses of Partnership administration in accordance with the Partnership Agreement. These expenses may include, in addition to the Partnership's share of Partnership fees and expenses payable to the General Partner . . ., additional compensation at comparable and reasonable rates for matters related to Partnership management outside the normal scope of activities required of the General Partner. [¶] The following table summarizes the forms and estimated amounts of compensation that may be paid to the General Partner in connection with the organization and operation of the Partnership. Other than as set forth herein, no other compensation of any form may be paid to any General Partner . . . ."

The table specifies the following items of general partner compensation: (1) $50,000 for startup expenses; (2) $25,000 for a feasibility study and partnership structuring; (3) $161,000 for leasing commissions; (4) a $214,000 development fee; and (5) a $70,000 design and construction coordination fee. The Allan Trust challenges the court's findings regarding the propriety of the development fees, design and construction coordination fees and leasing commissions paid to Gremark.

a. Development and Coordination Fees

The table to paragraph 5.5 provides that the general partner will be paid a $214,000 development fee "to be drawn pro rata as a percentage of performance" and a $70,000 coordination fee "to be drawn at the start of the design documentation phase." The Allan Trust contends that timing of payment pursuant to these provisions is clarified and circumscribed by the pro forma budget, which is attached as Exhibit F to the agreement and referred to in paragraph 5.5. It argues that the pro forma budget (which estimates that the first installment of the development fee being paid in August 1993, the

same date it projected that the partnership would incur its first "construction hard costs," and that $20,000 of the coordination fee would be paid prior to that date) controls over the more general provisions of paragraph 5.5 as to when the fees were payable.

The trust's reliance on the pro forma budget is misplaced. The evidence at trial establishes that the pro forma budget reflected project cash flow projections based on numerous assumptions and, as such, was subject to change based on variations between the assumptions and the actual circumstances. Further support for the conclusion that the pro forma budget was a forecasting or planning tool rather than an instrument defining what was required under the partnership agreement comes from the agreement itself; although other provisions of the agreement incorporate the pro forma budget by reference, paragraph 5.5 does not do so. The pro forma budget is not a contractual provision that trumps the language of paragraph 5.5 governing the payment of development and coordination fees.

b. Leasing Commissions

Paragraph 5.5 provides for the payment of $161,000 in leasing commissions, 50 percent payable "at signing of the lease" and 50 percent at occupancy by the tenant. The Allan Trust asserts that, notwithstanding the language of paragraph 5.5, the General Partner was not entitled to any leasing commissions (even though the partnership entered into a master lease of the premises to the Hospital) because the "more specific" provisions of the pro forma budget showed that the fees were not payable until after construction commenced and are controlling over the more general contrary language in paragraph 5.5. This argument is unavailing for the reasons specified above and for the additional reason that the pro forma budget is not more specific than the express language

of paragraph 5.5, which authorizes payment of a $80,500 commission at lease signing. The trial court did not err in determining that Associates' payment of $80,500 in lease commissions to Gremark was proper.

By cross-appeal, the Strada defendants challenge the court's finding that Associates' payment of an additional $34,000 in lease commissions violated the partnership agreement. They argue that based on uncontroverted testimony by Strada and Nelson that the entire commission was payable once the Hospital signed a master lease for space in the proposed building, the court's reduction of the commissions was erroneous. However, the Strada defendants' argument assumes that the trial court was required to accept the credibility of the testimony on this point, something it was not required to do. The language of paragraph 5.5 is unambiguous that 50 percent of the leasing commission was payable at the time the lease was signed and the other 50 percent upon *occupancy*. The agreement itself constitutes substantial evidence to support the trial court's finding that Associates paid $34,000 in excess leasing commissions.

3. *The Propriety of the Payment of Attorney Fee "Savings" to Strada*

In addition to defining the parameters of general partner compensation, paragraph 5.5 also provides "[e]xcept as noted above, no Partner or Affiliate of a Partner may enter into contractual or business dealings with the Partnership which would result in additional compensation, profits or earnings inuring to the benefit of such Partner or Affiliate without the prior written consent of a majority in Ownership Interest of the Partners." "Affiliate" is defined as "(i) any entity directly or indirectly controlling, controlled by, or under common control with another entity [here, a partner], (ii) any

person or entity controlling ten percent (10%) or more of the outstanding voting securities of an entity [a partner] or (iii) any officer, director or partner of an entity [a partner]." The Allan Trust contends that, because Strada owned and was an officer of two general partners of First Healthcare (the most recent general partner of Associates), he was an "affiliate" of Associates for purposes of applying Paragraph 5.5's prohibition on affiliate compensation, thus invalidating the attorney fee "savings" agreement between Strada and Associates. The Strada defendants object that the Allan Trust did not rely on this theory in the proceedings below (a point the trust admits) and cannot now raise it. The Allan Trust urges that we nonetheless consider the issue because the relevant facts were fully developed at trial and thus the issue raises a question of law.

Generally, issues raised for the first time on appeal are waived. (*Doers v. Golden Gate Bridge etc. Dist.* (1979) 23 Cal.3d 180, 184-185, fn. 1.) An exception to this rule exists where the belatedly raised issue presents a question of law, is presented on undisputed facts and involves a matter of public interest; in such a case, an appellate court has discretion to decide the issue even though it was not presented below. (*Cedars-Sinai Medical Center v. Superior Court* (1998) 18 Cal.4th 1, 5-7; *Jensen v. BMW of North America, Inc.* (1995) 35 Cal.App.4th 112, 132.) Here, the relevant facts are undisputed and the issue of whether Strada is an "affiliate" within the meaning of the partnership agreement is a question of law. (*Hess v. Ford Motor Co.* (2002) 27 Cal.4th 516, 527.) However, the issue does not raise a matter of public interest and, for this reason, we decline to consider it for first time on appeal. (*Resolution Trust Corp. v. Winslow* (1992) 9 Cal.App.4th 1799, 1810; see *Mattco Forge, Inc. v. Arthur Young & Co.* (1997) 52 Cal.App.4th 820 [a party is generally not

permitted to raise a new and different theory on appeal because doing so is unfair to the trial court and manifestly unjust to the opposing litigant].)

The Allan Trust also argues that Strada's arrangement with Associates regarding attorney fee "savings" violates paragraph 5.3.5, which requires the limited partners' consent to transactions in which a general partner has an actual or potential conflict of interest with the limited partners or Associates itself. The Allan Trust reasons that the "possible reduction of the contingency fee" payable to the law firm was a limited partnership asset and that it was thus a conflict of interest for First Healthcare to enter into the agreement with Strada on behalf of Associates because the agreement transferred that partnership asset to Strada. However, the contingency fee reduction was conditioned on Associates paying the costs of the litigation plus one-half of the attorney fees billed on an hourly basis (as incurred), something Associates did not have the money to do. For this reason, the benefit of a possible fee "savings" did not become a partnership asset until Associates entered into the agreement with Strada.

Finally, the Allan Trust contends that Strada was not entitled to participate in the fee "savings" because he did not in fact pay all of the fees and costs Associates incurred as he had agreed to do. However, the evidence was undisputed that Strada undertook responsibility for paying Procopio Cory's bills and communicated that to the firm and that the firm relied on that agreement as the basis for representing Associates in the lawsuit against Columbia. Further, although Strada did not promptly pay certain bills sent to him after April 1997, he ultimately did pay the outstanding fees and costs because those amounts were deducted from his share of the attorney "savings." The court did not err in

finding that Strada was entitled to receive the attorney fee "savings" and entering judgment against the Allan Trust on its conversion and conspiracy claims on that basis.

4. *First San Diego's Liability for the Excess General Partner Compensation*

The trial court concluded that First San Diego was not liable for the excess compensation paid by Associates to Gremark because First San Diego was not a general partner of First Healthcare when the excess payments were made. The Allan Trust asserts the trial court was required to award judgment against First San Diego as well as Gremark on the breach of contract claim based on the payment of excess compensation because the only credible evidence in the record establishes that First San Diego was Gremark's co-general partner in First Healthcare on April 22, 1996, the date determined by the court as the date Associates legally dissolved under the terms of the partnership agreement.

However, there is substantial evidence in the record to support a finding that First San Diego ceased being a general partner of First Healthcare on December 16, 1994, when the First Healthcare partnership agreement was amended to delete First San Diego as a general partner and name FSD as its replacement. Although an October 1995 amendment to the First Healthcare partnership agreement identified First San Diego as a general partner in First Healthcare, the court accepted Strada's testimony that the amendment erroneously identified First San Diego rather than FSD as a general partner. The Allan Trust challenges the credibility of Strada's testimony in this regard, pointing out that Strada also testified that First San Diego was never intended to be a general partner of First Healthcare at all. However, the court had a unique opportunity to assess Strada's credibility and was free to accept certain portions of his testimony, even though

it rejected others. Notably, other evidence in the record (including a subsequent amendment to the First Healthcare partnership agreement identifying FSD as an existing general partner) provides additional support for the trial court's finding.

5. *Attorney Fees and Costs*

A prevailing party is generally entitled, as a matter of right, to recover its costs in an action against it. (Code Civ. Proc., § 1032, subd. (b).) Where, as here, an agreement so authorizes, the prevailing party is also permitted to recover its attorney fees as an element of costs. (Code Civ. Proc., § 1033.5, subd. (a)(10)(A)-(C); *Santisas v. Goodin* (1998) 17 Cal.4th 599, 606; Code Civ. Proc., § 1021.) In ruling on a motion for attorney's fees, the trial court's determination that a particular party prevailed or of the amount to be awarded involves an exercise of discretion that will not be disturbed on appeal absent a clear showing that the ruling "exceeds the bounds of reason." (*Heppler v. J.M. Peters Co.* (1999) 73 Cal.App.4th 1265, 1297.)

A. First San Diego's Entitlement to Attorney Fees and Costs

The Allans contend that the trial court erred in determining that First San Diego was a prevailing party in the action because First San Diego only prevailed on the Allan Trust's tort claims against it. However, as shown by the judgment, the court expressly found in favor of First San Diego on the trust's breach of contract claim (as well as the conversion, constructive fraud and conspiracy claims), thus belying the Allans' contention and establishing a basis on which the court could properly conclude that First San Diego was a prevailing party entitled to recover attorney fees. The fact that the court granted judgment against First San Diego on the Allan Trust's *equitable* claims for

partnership dissolution and declaratory relief does not establish that the trial court abused its discretion in determining that First San Diego was a prevailing party. (See *Reveles v. Toyota by the Bay* (1997) 57 Cal.App.4th 1139, 1153, disapproved of on other grounds in *Snukal v. Flightways Mfg, Inc.* (2000) 23 Cal.4th 754, 761-766.)

B. The Amount of Fees Awarded to First San Diego and Strada

First San Diego also challenges the court's ruling on its request for attorney fees, contending that the court acted arbitrarily in awarding only $15,000 of the $26,464.83 in fees it requested. Strada similarly contends that the court abused its discretion in awarding him only $15,000 of the $31,177.33 he sought. These defendants argue that the Allan Trust improperly pursued this action against them, they prevailed on every contested claim against them and their attorney's declaration established the reasonableness of their fee request. However, we find no abuse of discretion. Based on the evidence submitted by the parties and its knowledge of the trial and the history of the litigation, the court made an assessment of the fees reasonably incurred by the Strada defendants collectively and then allocated those fees, on a pro rata basis, among those defendants. Although a different determination or allocation may have also been reasonable, First San Diego and Strada have not shown that the court's determination of the amount of reasonable fees or its allocation exceeded the bounds of reason.

C. The Amount of Fees Awarded to Nelson

Although Nelson represented himself in propria persona at the October 2000 trial, he and Gremark were represented by counsel in this action from February 1, 1999 until February 29, 2000. After prevailing on all claims against him, Nelson requested

$38,604.50 for the attorney fees incurred while he was represented by counsel. He contends that the trial court erred in awarding him only $10,000 in fees. Again, however, we find no manifest abuse of discretion. The requested fees were incurred in the defense of both Nelson and Gremark and thus properly allocable between them notwithstanding Nelson's argument that they should all be attributed to him. Further, the period of representation did not include the time when the most significant level of fees would be incurred (i.e., in trial preparation and during trial). The court did not abuse its discretion in setting Nelson's attorney fees at $10,000.

DISPOSITION

The judgment is affirmed. Each party is to bear its own costs on appeal.

McINTYRE, J.

WE CONCUR:

HUFFMAN, Acting P. J.

O'ROURKE, J.